

Limits of Criminalization of False News AsCriminal Acts in Elections

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Abstract

The serious danger of election hoaxes is when the hoax is conveyed to the public who are very apathetic or in people who do not trust the current government, and distributed massively ahead of voting day. It is at this stage that hoaxes can intervene free choice of voters who have greater autonomy. "The aim of this research is to analyze the basis and limits of criminalization of the act of fabricating and spreading hoaxes election. The focus of this research is on the act of fabricating and disseminating hoaxes part of election crimes. This research is document research using statutory approach and case approach. The results of this research show that the basis The criminalization of the act of fabricating and spreading election hoaxes is not because it exists lies but there are attempts to disrupt the democratic process and there is danger or loss remote harm in the form of a threat to national security. The act of manufacturing and spreading election hoaxes is part of the black campaign. Limitation Criminalization can be carried out if there is a clear and present danger and there is a mistake serious, intentional, from the perpetrator. However, there are difficulties in criminalizing it the act of fabricating and spreading election hoaxes. As part of a black campaign campaign) then the criminal act is formulated as an offense propria and the time of committing the criminal act limited to the campaign period only. The recommendation for this research is the use of facilities other than criminal law must be put forward. There needs to be regulation in the field of administrative law regarding election hoaxes both in election law and information law and electronic transactions.

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1. INTRODUCTION

In the era of globalization, technology continues to become more sophisticated, so there are many found sources that are often used by the community to obtain or looking for information or the latest news about what is happening/going viral in the country and even in corners of the world. Often People get sources of news and information through social media media. Social media or often called social media is online media supports social interaction between individuals or actions that occur at least two times or more people who interact reciprocally, directly or indirectly direct. The social media used is application-based technology digital which can turn communication into social interaction in a way share available information via social media in the form of photos, videos. And is a digital platform. In Indonesia itself, social media can be used used as a source of information and the latest news for the community such as Facebook, Instagram, YouTube, and TikTok and so on.

Fake news or what is often called hoax (hereinafter referred to as hoax) is information that does not match the facts/lies, slander or fraudulent activity, but it is made as if the news/information is true. Hoax is information is misleading and scary for the public because it is misleading public assessment by conveying incorrect information/news as truth.¹ So hoaxes can influence society in many ways tarnish someone's image and credibility. Hoaxes are referred to as "malicious

deception" means a lie that has a criminal purpose stated by the Oxford English dictionary.

What is currently a phenomenon is fake news/hoaxes that result concerns and has an impact on every level of society. Many factors which supports the spread of fake news/hoaxes causing it to get worse accepted by the local community. As a result, hoax news causes feelings suspicion and hatred of a particular group/organization in society, physically harming someone who is actually innocent, giving news false news to the government. As a result of the spread of hoax news causes people to believe in the news, which makes people believe It's not smart to consume news without knowing or checking the truth of the news he received. The purpose of spreading hoax news This means making society chaotic, society becoming restless, the emergence of feelings of hatred and also fear for the recipients of the hoax news. The impact caused by hoax news is the impact on the social sector economics, politics, security and what is more tragic is that it can threaten state security.

Currently, many hoax news are spread on social media. The use of social media as a medium for disseminating information is now commonplace making people start to feel anxious with the free distribution of news/information hoax. The spread of hoax news and information is encouraged by technological developments are increasing from time to time. On In 2017, there were around 132 million internet users in Indonesia, according to Tetra Pak Index in Yudhianto, this figure increases quite a bit if compared to the previous year 2016. In Indonesia in terms of increase Internet users approximately reach around 51% or around 45 million users internet with an increase in active users on social media reaching 34%. In The increase in internet users continues to increase over time, with a total of 129.2 million internet users have active social media accounts and on average The average person spends about 5 hours a day listening, hear information, news and so on as consumption people via mobile phone. Hoax and Election (general election), two words that are important in the performance democracy in Indonesia. In a democratic era that is very vulnerable to something divisions, hoaxes and elections are related to each other in terms of participation in general elections to determine the best leader.

By taking advantage of increasingly dynamic technological advances, fighters In politics, each person has intense competition to attract sympathy the voters. The way to do this is by spreading news that is not true true or hoax in front of the public (general). From the spread of the news tend to "nudge" issues that are personal or that are often mentioned someone's privacy. Just like there are beliefs held by someone regarding a value held firmly by individuals in a group as well other problems that can cause irritation for the recipient of the news not true or a hoax.

A video has circulated claiming that the 2024 election results are in prepared by the Election Commission or what is usually called the KPU. In this claim which has been prepared by the KPU, namely Hasyim Asy'ari as chairman of the KPU, he explained that the video circulating was a hoax and was not appropriate that happened. Meanwhile, the 2024 election will be held on February 14

2024. As stated in "Articles 14 and 15" of the Emergency Law Number 1 concerning Criminal Law Regulations, regarding hoax news as in This law has criminalized the actions of someone who spreading hoaxes. These provisions are still valid and applied to any individual who spreads hoaxes regarding the election. Looking at the period from 2018 to 2022, there were 11 court decisions regarding spreading hoaxes or fake news regarding the election.

As Law no. 7 of 2017 concerning General Elections as has been replaced by Government Regulation in Lieu of Law (Perpu) No. 1 of 2022 concerning Amendments to Law no. 7 Years 2017 concerning General Elections (Perpu No. 1 of 2022), has provisions for action criminal. Including criminal provisions regarding false statements and lying during the campaign period. Elections cannot be separated from freedom of expression and democracy. Freedom of expression is part of the rights basic human rights in a state and democracy. According to Eric Barendt and Larry Alexander one of the justification arguments against freedom of expression is citizen participation in democracy (citizen participation in a democracy). Freedom of expression is involved in decision making democratically. A democratic decision requires opinion and information from its citizens. In elections, citizens give opinions and his choice to determine the people's representatives who will determine policy in legislative field and to determine. president and vice. the president will determine policies in the executive sector. Therefore it is important to take care of it the flow of information dissemination from the rise of hoaxes, especially during the election period.

2. METHODS

The research in this writing uses a combination type of research, namely between doctrinal legal research and non-doctrinal research that can be used as an alternative solution in studying law in the midst of changes era with its various developments that are no longer possible the existence of a mono law without being in contact with being influenced by non currents law.

3. RESULTS AND DISCUSSION

3.1. The Basis for Criminalizing Spreading Hoaxes in Elections

According to Topo Santoo and Disko Criminal Practice, elections are an act carried out either by a person or an individual or an entity that disrupts, obstructs or interferes with the implementation of elections an act that violates the stages of an election. Election crimes regulated either in the Law regarding elections or other Laws who regulates this. Prohibited acts must apply during the period implementation of elections. The regulation of election crimes is not only regulated in Law no. 7 of 2017 as replaced by Perpu no. 1 Year. 2022 but also regulated in the Criminal Code.

The Criminal Code has criminalized fraudulent acts that disrupt implementation and election results. These provisions are included in Articles 148, 149, 150, 151 and Article 152 of the Criminal Code. However, political developments in Indonesia encourage regulation criminal provisions regarding elections outside the Criminal Code. In "Law no. 15 1969 concerning the Election of Members of the Representative Consultative Body People" Regulations on Election Crimes were regulated during the New Order.

After the 1998 reform, political developments gave rise to a shift in the system policy in elections from indirect elections to direct elections and the implementation of elections is carried out jointly, neatly and organized and also running massively. Consequences of the implementation of democracy a set of legal rules is needed to regulate and protect its operations the democratic election process. "UU no. 7 of 2017" as it has been replaced with Government Regulation in Lieu of Law Number I of 2022 hereinafter referred to as Perpu are provisions in the administrative field which regulates the implementation of elections and contains criminal provisions in electoral field. In its development, Law no. 1 of 2023 concerning The Criminal Code no longer regulates criminal acts regarding elections.

In "Law no. 7 of 2017" as replaced by Perpu no. 1 of 2022 has many criminal provisions. There are 66 articles that regulate actions election crime. Some of these criminal acts are formulated as offenses propria. This criminal act is specifically aimed at the following subjects. First, election participants, consisting of "presidential candidates and vice presidential candidates, candidates for members of the people's representative council, both central and regional, as well as leaders of political parties participating in the election. Second, campaign implementers, teams and participants.

Third, the election organizers consist of members of the Election Commission (KPU), the Agency Election Supervisors (Bawaslu) both at the central and regional levels. Fourth, committee election organizers, both election committees and election committees at the level central, local and abroad. Fifth, state officials, civil servants, members as well as military and police leaders. Sixth, entrepreneur or employer. Besides that There are some of the formulations of election crimes that are formulated as offenses general that applies to everyone which means that anyone can become perpetrators of general offenses without regard to certain status or qualities.

Election crimes in "UU no. 7 of 2017 as replaced by Perpu No. I of 2022" is a special criminal law. According to Andi Hamzah⁹ and Sudarto¹⁰ special criminal laws are "laws outside the Criminal Code whether" they are criminal laws or statutes. In external criminal law which contains sanctions for criminal acts. Against the law This special law has provisions that violate legal principles criminal. Provisions in Law no. 7 of 2017 as has been changed to Perpu No. 1 of 2022 is a regulation in the administrative sector that regulates regarding the stages of election implementation. However, to guarantee participation democratic society and to overcome various problems If the implementation of elections includes fraud, provisions are

needed criminal. Therefore "Law no. 7 of 2017" as amended becomes Perpu No. 1 of 2022 is a special criminal law because is a law in the legal aspect of administration which includes matters which contains criminal charges.

In essence, the criminal provisions in Law no. 7 of 2017 as it has been replaced with Perpu no. 1 of 2022 is an administrative penal law. Wrong One characteristic of administrative penal law is that it is guided by principles *ultimum remedium* which limits the use of criminal sanctions when other sanctions exist outside criminal law, in this case administrative sanctions, which are more effective. this principle also known as last resort, which means the imposition of criminal sanctions should be used as a last resort when other sanctions cannot be implemented. However, Law no. 7 of 2017 as has been replaced with Perpu no. 1 The year 2022 separates violations in administration from violations in the election. Article 460 Law Number. 7 of 2017 states that it is a violation administrative is a violation of procedures, methods, or methods administration of election implementation and this violation is not an act election crime. As a result, the use of criminal sanctions can be carried out without further ado first impose administrative sanctions which may be more effective.

Therefore, election crimes are special crimes. Specificity of This criminal act lies in the presence of fraudulent acts in implementation elections or other forms of violations of the election stages.

Election crimes are different from the forms of "administrative violations and violation. code of Ethics. Election. "The perpetrators of election crimes are not only limited to election participants.

In its development, election hoaxes circulated massively, especially through Internet. Based on research results from Bradshaw and Philip N. Howard and Center for Innovation Policy and Governance there are actors who create hoaxes through internet, especially during and before the elections in Indonesia. These actors has the task of developing propaganda strategies and techniques on the internet and social media, manipulate content, take data illegally and manipulate certain parties with the content they create. The actors worked in groups and organized with or without receiving monetary rewards to fabricate and spread hoaxes. Political figures and political parties too use the services of these actors. This hoax production was carried out for manipulate public opinion, especially internet users, by creating content containing support for certain parties, attacking political opponents, and driving division among internet users. Patterns of spreading fake news This is done using robot accounts (bots) or special fake accounts created to spread the news. These various fake accounts are programmed to work automatically generating messages, following other party accounts, reply to messages or comments, as well as share specific hashtags that are addressed to certain community groups.

Democratic elections are the foundation for a government that has legitimacy. Elections represent the people's choice, indicating their existence democratic government because the government is carried out by the people for people. For this reason, people must be able to access information freely and correctly to manage his political choices. People's choices must be based on will freedom obtained from correct and balanced information. Therefore the existence of massive hoaxes during elections is a threat to democracy. Hoaxes will mislead minds and influence individual decisions and collective voters. The voter's choice is based on that information false, false and inaccurate. Hoaxes must be treated as a threat, that undermines or interferes with effective participation in elections. Actions Intervening in the election process is an act that threatens security national level even though it has little impact on election results.

The act of fabricating and spreading hoaxes that bring down political opponents or those that create public distrust regarding the election results is a black campaign. According to Topo Santoso Black campaigns are carried out using incorrect or fabricated data with the aim of destroying someone's character. Hoak contains some or all of the data that is incorrect. Some hoaxes are accompanied by news links from cyber media to convince internet users that the message is correct it is accepted as true and trustworthy. Link to the cyber media report in the form of clickbait which aims to mislead readers who are not careful because it contains a false connection. This destruction of character is not only intended to individuals but also to parties participating in the election and to institutions general election organizers and other participating parties towards the election. The goal is not only to win the election, but also

giving rise to public distrust regarding the stages and results of the elections that have taken place carried out democratically.

Thus, the act of creating and spreading hoaxes during elections is an act that threatens democracy. This action is fraudulent acts aimed at winning elections by overthrowing opponents politics or aims to create public distrust in elections. The act of creating and spreading hoaxes during elections is a form black campaign.

Black campaigns lead to criminal acts. When you want to position the act of fabricating and spreading hoaxes as a black campaign is a criminal act, it is necessary to analyze whether the act meets the requirements and limits on criminalization. The word criminalization is defined as part of creation law, namely a state act that places an action or certain negligence as a criminal offence, along with the provision of a series of sanctions for prohibited acts. The word criminalization here is part of legislative policy.

According to Simester and von Hirsch, criminalization must be based on existence wrong behavior (wrongfulness) and the presence of direct or indirect danger to the freedom of others. Wrong behavior is not based solely on purely a moral issue but also considering the intended goals protected from prohibitions against such actions, the measure of morality is not only seen solely from the perspective of religion which states that lying is a sin, but the impact of these lies is what causes anger and disputes between members of society. This measure is then used to judge an immoral act. More, though lying about the election does not cause anger or discord in in society, it must be considered that there is a greater purpose for prohibit the spread of these lies during the election period. This goal is to protect the democratic process so that the government obtains legitimacy.

Without legitimacy, it is difficult for the government to carry out its duties and there may be chaos and threats to the integrity and security of the country. Olch therefore this prohibition has the ultimate goal of protecting state security interests. Thus, the fabrication and dissemination of hoaxes during elections constitutes wrong behavior. A hoax is an act of cheating to win an election or cast doubt on the election process by misleading voters. Hence the fabrication and the dissemination of hoaxes during elections fulfills the initial requirements for criminalized.

3.2. Limits of Criminalization of Spreading Hoaxes in Elections

Concerning guilt and criminal liability, Simester and von Hirsch found that there is fair imputation to assess the criminal responsibility of the perpetrator for the final danger or loss (eventually harm) done by the person who have autonomy.²⁵ Fair imputation links mens rea and loss or final danger (eventual harm) with criminal responsibility (criminal liability). The existence of mens rea, equivalent to guilt in the narrow sense, is the key to being able to impose criminal liability on someone for final danger or loss (eventual harm) which is prohibited.

According to Ashworth and Zedners²⁶ to link mens rea and danger end (eventual harm) at least the perpetrator has one of the following three things. First, the perpetrator's normative involvement in danger or danger final loss (eventually harm) that will occur. Second, the perpetrator can predict any indirect losses that will occur. It means perpetrator have knowledge and will of the final danger that occurs. The perpetrator has intention, the mental state of an individual who has the desire or will to achieve a certain state as a consequence of his actions. Third, the perpetrator did not take action to prevent future losses arise. This situation is a form of intention with possibility. The perpetrator had knowledge of the consequences that would occur but he did not do it action to prevent that consequence because the perpetrator actually wanted it the.

Perpetrators of spreading new election hoaxes can be charged legal responsibility for disturbances to state security, if the perpetrator had intention. In this case the perpetrator must know that message what he will say is a lie or not based on correct data, and the perpetrator knows that the hoax he spreads will mislead voters so cause election fraud or cause public distrust of the election. The perpetrator really wanted to win the election in a fraudulent way or by wanting the public to distrust the process election. The existence of normative involvement (normative involvement) also shows the perpetrator's intent. Normative involvement occurs when the perpetrator in his hoax includes inciting or persuading voters to not to vote for one of

the candidates participating in the election or not to participate. In voting, the existence of incitement or persuasion must be based on it as the perpetrator's knowledge that the message he conveyed was a lie and there is a desire to fix the election by fraudulent means or wants the public not to believe in the election process.

Thus, the formulation of criminal acts of election hoax must be carried out with strict. Especially regarding the element of error. The crime of spreading election hoaxes can only be committed as a *dolus* offense. In this form the offense can be withdrawn causal relationship between the legal responsibility of the perpetrator and the action what is done and the final consequences (eventually harm) that are prohibited.

There are difficulties in criminalizing election hoaxes. The difficulty regarding the formulation as a formal offense or material offense. Difficult to formulate Election hoaxes are a formal offense. In formal offenses, criminal acts are formulated by prohibiting an act, whether active or passive. Not all statements that are untrue or inaccurate are statements which is dangerous and should be prohibited. It is difficult to assess the presence of danger from untrue statements in a black campaign because it depends for each individual voter. When prohibiting a political statement because there is data or information that is not correct, this will be limiting individual freedom of expression to seek the truth and to participate active in democracy.

On the other hand, there are difficulties if it is formulated in the form of a material offense, action a crime that is formulated by prohibiting a prohibited consequence. There are difficulties in assessing the existence of serious and real dangers in election hoaxes to national security. In particular, regarding false statements and manipulative but not followed by any direct consequences in society such as violence or riots. According to Simester and von Hirsch, there are difficulties in criminalizing indirect harm, especially in assess the limits of loss or danger that can be punished and impose liability criminal responsibility for the final danger that occurs. Spread of hoaxes via the internet aims to influence voters' choices and not cause harm directly for state security. However, if this hoax is allowed to spread could pose a threat to the democratic process. In terms of Today, it is difficult to draw a line between dangers to state security on the one hand with criticism of the election which must be protected as part of freedom of expression on the other hand. There are difficulties in assigning responsibility criminal responsibility, when in a statement there is no form of normative involvement or normative involvement towards the ultimate danger (eventual harm) forbidden.

According to Simester and von Hirschs and Ashworth and Zedner, there is normative Involvement is a manifestation of the perpetrator's evil intentions to create danger which is prohibited. Therefore, there are messages that are incorrect and inaccurate regarding the election without any invitation not to disrupt the election or carry out actions that disrupt the election or commit acts of defiance other laws do not meet the requirements to be criminalized. Another difficulty In criminalizing election hoaxes, it is formulated as a private offense. If you look at the formulation of the criminal act of black campaign, Article 521 Juncto Article 280 paragraph (1) letters c, d and e in Law no. 7 of 2017, perpetrators of criminal acts are limited to implementers, participants and campaign teams election. In practice, in court decisions regarding actions the crime of spreading hoax news that disturbs public order in Article 14 and Article 15 of Law no. 1 of 1946, the defendants spread false news regarding elections, they are not implementers, participants or campaign teams election.

According to Duff and Marshalls³¹ and Simester and von Hirsch, there are limitations in the use of criminal law, even though an act is immoral, There are principles for determining whether an action is appropriate and possible criminalized or not. When an act does not meet the requirements for criminalized, then efforts to resolve outside of criminal law must be put forward. This is part of the principle of *ultimum remedium* or the principle of last resort in law criminal. The function of criminal law is "fragmentary", meaning that criminal law only can protect some.³³ On the act of spreading election hoaxes Criminal law can only protect national security interests if These actions indicate a clear and present threat of danger. Criminalization can only be carried out against forms of false statements inciting and attacking the democratic process which results in fraud massive elections and public distrust of elections which led to riots. Therefore, there are internal boundaries the use of criminal law in tackling the spread of election hoaxes. Criminal law is the last resort so that outside legal means are used Criminal

law should be prioritized in tackling the spread of hoaxes elections, as is the case in the United States and Singapore. Therefore, regulations in the field of administrative law are both in the information law regime and electronic transactions as well as in the election law regime should be put forward.

4. KESIMPULAN

The criminalization of the act of fabricating and spreading election hoaxes is intersecting with protection against political statements (political speech) so that Criminalization can only be carried out for serious dangers and mistakes. The serious danger of election hoaxes is when they are hoaxes delivered to people who are very apathetic or to people who are not believe in the current government, and spread massively towards the day voting. It is at this stage that hoaxes can interfere with voters' free choices who have greater autonomy. The presence of serious errors is indicated by there is intent on the part of the perpetrator. The act of fabricating and spreading hoaxes is part of a black campaign, so this action should be carried out by implementers, election participants and campaign teams and the implementation time must be at a special time determined by law legislators and election organizers. But in words the spread of fake news regarding the election, both the perpetrator and the time the hoax was spread does not meet these qualifications. Thus criminal law constitutes an ultimum remedy or last resort, non-penal means should be put forward in tackling the spread of election hoaxes.

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